

E-FILED - 1/15/14

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WILLIE BRANNER, aka JAMES WILLIS
JOHNSON,

Petitioner,

v.

KEVIN CHAPPELL, Acting Warden of
California State Prison at San Quentin

Respondent.

No. C 90-3219 DLJ

**ORDER DENYING RESPONDENT'S
UPDATED MOTION TO DISMISS
CLAIMS BASED ON STATUTE OF
LIMITATIONS**

DEATH PENALTY CASE

I. Introduction

Petitioner's habeas petition challenging his state conviction and sentence is pending before the court. Respondent has filed a motion seeking dismissal of numerous claims based on the statute of limitations established by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Petitioner contends that he is entitled to tolling of the limitations period. Pursuant to Civil Local Rules 7-1(b) and 7-6, the court finds that petitioner's motion is appropriate for submission on the papers without oral argument. For the reasons stated below, the court denies respondent's motion.

II. Background

In 1982, petitioner was convicted in Santa Clara County Superior Court of murdering Edward Dukor in Dukor's jewelry store in a shopping center in Milpitas, California. The jury found the special circumstance that he committed the murder in the course of robbery to be true and fixed the penalty at death. People v. Johnson, 47 Cal. 3d 1194, 1212 (1989). The California Supreme Court affirmed the conviction and sentence on February 23, 1989. The United States Supreme Court denied petitioner's petition for writ of certiorari on March 19, 1990.

Acting in pro per, petitioner filed in this court on November 9, 1990, a request for a stay of execution and appointment of counsel. The court stayed the execution and referred the matter for appointment of counsel. On January 31, 1991, the court appointed the California Appellate Project ("CAP") to represent petitioner. On October 6, 1992, CAP filed a motion to withdraw from petitioner's case. The court granted this motion on January 12, 1993, and appointed attorneys Alexander Brainerd, Kenneth Keller and David Eiseman from the law firm of Bronson, Bronson & McKinnon to represent petitioner. On March 14, 1997, Alexander Brainerd and David Eiseman resigned from the Bronson firm and joined the law firm of Quinn Emanuel Urquhart Oliver & Hedges, LLP. David Eiseman remained as appointed counsel, while Alexander Brainerd and Kenneth Keller withdrew from representation and were replaced by Carlyn Clause of the Bronson firm. Carlyn Clause subsequently withdrew from the case.

Pursuant to the court's instructions, on April 23, 1997, petitioner filed a federal habeas petition containing only exhausted claims, a notice regarding the existence of non-exhausted claims and a motion to hold proceedings in abeyance pending the exhaustion of non-exhausted claims. On October 6, 1997, the court granted petitioner's abeyance motion and directed him to exhaust all unexhausted claims once they were identified by the court. On November 6, 2002, petitioner filed an exhaustion petition in state court. The California Supreme Court denied this petition on the merits and on procedural grounds, in a two-page order on October 29, 2003. In re Willie Branner,

1 Cal. Supr. Ct. No. SO92757 (Oct. 29, 2003).

2 Pursuant to the court's instructions, petitioner filed an amended federal habeas petition
3 containing his newly-exhausted claims in this court on December 19, 2003. After litigating issues of
4 procedural default and other procedural bars, respondent subsequently filed the instant motion to
5 dismiss. Briefing on the matter was completed on December 28, 2010.
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7 Respondent argues that although petitioner's original federal habeas petition, filed on April
8 23, 1997, was timely, claims contained in his amended petition, filed on December 19, 2003, are
9 time-barred. He contends that these claims do not relate back to any claim asserted in the original
10 petition. Respondent further requests that the court vacate, nunc pro tunc, its 1997 order granting
11 petitioner a stay on the grounds that petitioner has engaged in dilatory practices that render the stay
12 inappropriate. Petitioner counters that he is entitled to equitable and statutory tolling of the
13 limitations period. He also contends that claims in his amended petition relate back to claims in his
14 original petition, but reserves briefing on the matter, should it be necessary, for a later date.
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17 III. Discussion

18 The AEDPA imposes a one-year limitations period for the filing of a federal habeas petition.
19 28 U.S.C. § 2244(d)(1). The statute provides, in pertinent part, that the limitations period runs from
20 the latest of the date on which the judgment became final by the conclusion of direct review or the
21 expiration of the time for seeking such review. 28 U.S.C. § 2244(d)(1)(A). "Direct review"
22 includes the period within which a petitioner can file a petition for a writ of certiorari from the
23 United States Supreme Court, whether or not the petitioner actually files such a petition. Bowen v.
24 Roe, 188 F.3d 1157, 1159 (9th Cir. 1999). The time during which a properly filed application for
25 state post-conviction or other collateral review is pending shall not be counted toward the limitation
26 period. 28 U.S.C. § 2244(d)(1)(2).
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1 The Supreme Court of the United States recently held that the timeliness provision in the
2 federal habeas corpus statute is subject to equitable tolling. Holland v. Florida, 130 S. Ct. 2549,
3 2560 (2010). A federal habeas petitioner “is ‘entitled to equitable tolling’ only if he shows ‘(1) that
4 he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his
5 way’ and prevented timely filing.” Id., at 2562 (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418
6 (2005)). “When external forces, rather than a petitioner’s lack of diligence, account for the failure to
7 file a timely claim, equitable tolling of the statute of limitations may be appropriate.” Miles v.
8 Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). The extraordinary circumstances must be the cause of
9 the untimeliness. Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003).

11 Here, petitioner’s direct appeal was denied on February 23, 1989. The United States
12 Supreme Court denied petitioner’s petition for writ of certiorari on March 19, 1990, rendering his
13 conviction final. Because petitioner’s conviction was final on direct appeal prior to the enactment of
14 the AEDPA, his limitations period began to run on April 23, 1996, and expired on April 24, 1997.
15 See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). Absent tolling or a finding of
16 relation-back, petitioner’s amended petition, filed on December 19, 2003, is therefore untimely.

18 Petitioner’s request for tolling is largely occasioned by the interplay between three legal
19 principles: the “total exhaustion requirement” of Rose v. Lundy, 455 U.S. 509, 522 (1982), the
20 AEDPA’s statute of limitations and the “relation back” standard articulated in Mayle v. Felix, 545
21 U.S. 644, 656 (2005). Under Rose, petitioners were required to fully exhaust their claims in state
22 court before seeking federal habeas relief. “Rose required district courts to dismiss a “mixed”
23 petition, ‘leaving the prisoner with the choice of returning to state court to exhaust his claims or of
24 amending or resubmitting the habeas petition to present only exhausted claims to the district court.”
25 King v. Ryan, 564 F.3d 1133, 1138 (9th Cir. 2009), quoting Rose, 455 U.S. at 510.

27 The AEDPA’s one-year statute of limitations changed the practical impact of Rose’s total
28 exhaustion requirement. It meant that “petitioners whose mixed petitions were dismissed under

1 Rose ran the risk of being time-barred from bringing their claims, once exhausted, in federal court."
2 King, 564 F.3d at 1138. In view of this problem, the Ninth Circuit developed a three-step procedure
3 for mixed petitions, allowing:

- 4 (1) a petitioner to amend his petition to delete any unexhausted claims; (2) the court
5 in its discretion to stay and hold in abeyance the amended, fully exhausted petition;
6 (3) once the claims have been exhausted in state court, the petitioner to return to
federal court and amend his federal petition to include the newly exhausted claims.

7 Id. at 1139, citing Calderon v. United States District Court (Taylor), 134 F.3d 981, 986 (9th Cir.
8 1998). This procedure curtailed the risk that petitioners might forfeit federal review of their
9 unexhausted claims.

10 In 2005, the United States Supreme Court's decision in Mayle rendered the amendment of
11 federal petitions to include newly exhausted claims problematic. Prior to Mayle, under Ninth
12 Circuit law, an amendment to a habeas petition related back to the date of the original petition "so
13 long as the new claim stems from the habeas petitioner's trial, conviction, or sentence." 545 U.S. at
14 656. Finding this interpretation of the relation-back standard too broad, the Supreme Court held that
15 an amended claim in a habeas petition relates back for statute of limitation purposes only if it shares
16 a common core of operative facts with the original claim. Id. at 664. This new standard rendered
17 the demonstration of timeliness of claims amended into federal habeas petitions more difficult.
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19 Petitioner faces the conundrum created by Rose, the AEDPA and Mayle. Having followed
20 the court's instructions to file a petition containing only exhausted claims prior to the expiration of
21 the statute of limitations, and to request a stay pending the completion of state exhaustion
22 proceedings, petitioner's exhausted claims are now barred by the statute of limitations unless they
23 relate back to claims in his original petition under Mayle, or the statute of limitations is tolled.
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25 As discussed below, equitable principles dictate that the period from April 23, 1997, the date
26 petitioner filed his original petition, until December 19, 2003, the date of filing of the amended
27 petition, be tolled. Petitioner has diligently pursued his rights and extraordinary circumstances
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1 prevented timely filing. Holland, 130 S. Ct. at 2562.

2 **A. Diligent Pursuit of Rights**

3 Petitioner has diligently pursued habeas relief. After his conviction and sentence became
4 final on direct appeal on March 19, 1990, he initiated his federal habeas proceedings by requesting
5 appointment of counsel on November 9, 1990. The court granted the request and the California
6 Appellate Project ("CAP") was appointed to represent him on January 31, 1991. CAP began
7 reviewing the 12,000-page record and briefing related to petitioner's trial. From 1991-1992, CAP
8 investigated potential state and federal habeas claims. Its efforts were hampered by the fact that no
9 extra-record investigation had been conducted while petitioner's case was in state court. Dkt. No.
10 238.

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12 In October 1992, CAP moved to withdraw as petitioner's counsel. Then-Chief Judge
13 Henderson requested that current counsel's former firm, which specialized in intellectual property
14 and commercial litigation, accept appointment as counsel. None of the attorneys in that firm had
15 any experience representing a capital defendant. Nonetheless, in January 1993, the court allowed
16 current counsel to substitute CAP with the understanding that CAP would assist the firm on an
17 ongoing basis. Id.

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19 Newly-substituted counsel immediately began reviewing the extensive documents provided
20 by CAP and met with petitioner several times. By the end of 1993, counsel had completed initial
21 review of the documents, retained an investigator and sought a consultant for further aid. Their
22 investigation was hindered by the fact that they were unable to interview petitioner's trial counsel,
23 who had passed away in June 1992.

24
25 In August 1994, petitioner's counsel filed a request for funds to retain investigators and
26 consultants. As part of their investigation, counsel requested that respondent stipulate to the
27 issuance of subpoenas to obtain various records. Because respondent refused to stipulate, petitioner
28 sought authorization to serve subpoenas from the court. Following briefing and a hearing, the court

1 issued an order in January 1995 permitting petitioner to serve subpoenas seeking a limited range of
2 records from two law enforcement agencies. Id.

3 In the interim, CAP was defunded as a federal resource center. As a result, petitioner's
4 counsel lost CAP's assistance.

5 At the time of the enactment of the AEDPA in April 1996, petitioner was continuing to
6 investigate and prepare his federal claims. The AEDPA introduced, for the first time, a statute of
7 limitations for federal habeas petitions. Petitioner promptly sought the court's guidance as to its
8 effect on his case. Dkt. Nos. 85, 238. On March 24, 1997, the court ruled that the AEDPA's statute
9 of limitations did not apply to petitioner's case. Dkt. No. 91.

10 Out of an abundance of caution, petitioner nonetheless filed on April 23, 1997, within the
11 statutory period, a federal petition containing only exhausted claims, a notice of unexhausted claims
12 and a motion to hold the petition in abeyance pending the completion of exhaustion proceedings in
13 state court. This filing was in compliance with the court's scheduling order. Dkt. No. 93.

14 On October 6, 1997, in light of Calderon v. United States District Court (Kelly), 127 F.3d
15 782 (9th Cir. 1997), the court reversed itself and found that the AEDPA statute of limitations did
16 apply to petitioner's case. Dkt. No. 127. The court directed petitioner to delete any claims it
17 determined to be unexhausted and stayed the petition pending the completion of exhaustion
18 proceedings. The court instructed petitioner to present unexhausted claims to the state court within
19 60 days of the date of the court's order identifying unexhausted claims.

20 Petitioner followed the court's instructions. The court identified unexhausted claims in June
21 1999. Dkt. No. 142. Petitioner withdrew them from his petition in July 1999. Dkt. 145. Following
22 the court's grant of four extensions of time, petitioner filed a 500-page state exhaustion petition
23 containing 69 claims on November 6, 2002. The Supreme Court of California denied it on October
24 29, 2003.

1 The court held a status conference on November 14, 2003, during which it ordered petitioner
2 to file an amended petition containing his newly exhausted claims by December 19, 2003. He did
3 so. Throughout his habeas proceedings, petitioner has complied with court orders, observed
4 deadlines and moved forward with his case.

5 Respondent argues that petitioner was dilatory in the years prior to the commencement of the
6 limitations period, in effect ever since his conviction became final on direct review. Seven years
7 elapsed between the time that his conviction became final and the date his original petition was filed
8 on April 23, 1997. During a portion of that time however, petitioner either lacked counsel because
9 the state court did not provide him with counsel to pursue state habeas proceedings, or his federal
10 representation was in flux as a result of numerous substitutions of counsel. Furthermore, the state's
11 failure to provide petitioner with habeas counsel made the preparation of an exhaustion petition
12 more time-consuming for federal counsel. As described above, federal counsel diligently pursued
13 petitioner's claims despite numerous obstacles, and notwithstanding the fact that no statute of
14 limitations existed prior to the passage of the AEDPA.

15 Respondent's contention that petitioner was dilatory in filing his state exhaustion petition
16 once federal counsel were appointed is refuted by the court's finding of good cause for granting
17 petitioner four extensions of time to prepare and file the petition. With each extension request, the
18 court found that the need for additional time was warranted. See Dkt. Nos. 146, 147, 149 and 152.

21 **B. Extraordinary Circumstances**

22 Extraordinary circumstances warrant an equitable tolling of the statute of limitation. As
23 discussed below, the extraordinary circumstances that render the petition time-barred are changes in
24 the law largely occasioned by the passage of the AEDPA. See Harris v. Carter, 515 F.3d 1051 (9th
25 Cir. 2008) (petitioner entitled to equitable tolling where the Supreme Court's overruling of precedent
26 he had relied upon made it impossible to file a timely petition), Townsend v. Knowles, 562 F.3d
27 1200 (9th Cir. 2009), abrogated on other grounds, Walker v. Martin, 131 S.Ct. 1120 (2011) (change
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1 in law warrants equitable tolling); Ashmus v. Ayers, C93-594 TEH (N.D. Cal. Oct. 5, 2006); Jesus
2 v. Miller, 215 F. Supp. 2d 410 (S.D.N.Y. 2002).

3 First, the Ninth Circuit's decisions in Greenawalt v. Stewart, 105 F.3d 1268 (9th Cir. 1997),
4 and Calderon v. United States District Court (Gordon), 107 F.3d 756 (9th Cir. 1997), precluded
5 petitioner from originally filing a mixed petition which ultimately would have preserved the
6 timeliness of all of his claims. Greenawalt and Gordon interpreted Rose to require the total
7 exhaustion of habeas claims filed in district court and the dismissal of "mixed petitions." Pursuant
8 to these cases as well as the court's instructions, (Dkt. No. 93), petitioner's original petition, filed on
9 September 23, 1997, contained only exhausted claims. In Rhines v. Weber, 544 U.S. 269, 275
10 (2005), however, the Supreme Court recognized that as a result of the interplay between the
11 AEDPA's statute of limitations and Rose's dismissal requirement, "petitioners who came to federal
12 court with 'mixed' petitions run the risk of forever losing their opportunity for any federal review of
13 their unexhausted claims." The Court therefore afforded district courts discretion to grant stays of
14 mixed petitions. Id. at 277. But for Greenawalt and Gordon, petitioner would have filed a mixed
15 petition, as was indeed the practice in the Ninth Circuit prior to these decisions, see former Local
16 Rule 296-8(e), and his claims would have been timely.

17 Second, after petitioner filed his petition in 1997, the Supreme Court's decision in Duncan v.
18 Walker, 533 U.S. 167 (2001), changed the law relating to statutory tolling. The AEDPA's statute of
19 limitations is tolled while "a properly filed application for State post-conviction or other collateral
20 review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). In
21 Duncan, the Court held that the phrase "State post-conviction or other collateral review" does not
22 include federal habeas petitions, and therefore the AEDPA's statute of limitations is not tolled by the
23 filing of a federal habeas petition. 533 U.S. at 181-82. Until Duncan, petitioner had every reason to
24 believe that the filing of his federal petition statutorily tolled the limitations period and obviated the
25 need to file a state habeas petition in order to benefit from statutory tolling.
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1 Third, as discussed above, the Supreme Court's decision in Mayle made relation-back much
2 more difficult. Mayle provides that a petitioner may amend a new claim into a pending federal
3 habeas petition after the expiration of the statute of limitations only if the new claim shares a
4 "common core of operative facts" with the claims in the pending petition. 545 U.S. at 659. The
5 scope of claims eligible for relation-back was further narrowed in King, 564 F.3d at 1142, in which
6 the Ninth Circuit held that new claims may only relate back to claims that were "properly contained
7 in the original petition - that is, those claims that were exhausted at the time of filing." To the extent
8 that any of petitioner's claims do not relate back to claims in his original petition, their resulting
9 untimeliness is a consequence of the new standard announced in Mayle.

11 Finally, tolling is warranted because in light of the gravity of capital punishment, a rigid
12 application of the limitations period would be unfair. In considering a request for equitable tolling
13 from a capital prisoner, the Third Circuit observed:

15 If the limitations period is not tolled in this case, [petitioner] will be denied all federal
16 review of his claims. Here the penalty is death, and courts must consider the ever-
17 changing complexities of the relevant provisions [petitioner] attempted to navigate.
18 Because the consequences are so grave and the applicable law is so confounding and
19 unsettled, we must allow less than 'extraordinary circumstances' to trigger equitable
20 tolling of the AEDPA's statute of limitations when a petitioner has been diligent in
21 asserting his or her claims and rigid application of the statute would be unfair.

19 Fahy v. Horn, 240 F.3d 239, 245 (3d Cir. 2001). As the Supreme Court has repeatedly observed,
20 "death is different." See Caldwell v. Mississippi, 472 U.S. 320, 329 (1985).

22 In sum, equitable tolling is necessary to soften the harsh impact of rules that might otherwise
23 prevent petitioner from obtaining federal review of his claims. Petitioner has diligently pursued his
24 claims and has sought guidance from the court when unsure as to how he should proceed. He has
25 always complied with court orders. He filed a habeas petition within the limitations period even
26 though the court had ruled that the AEDPA's statute of limitations did not apply to his case. He also
27 provided respondent, within the limitations period, notice of his unexhausted claims which under
28 then-existing precedent, he was precluded from including in his petition. After the court determined

1 that the limitations period did apply, he relied on then-existing precedent and court rulings to delete
2 unexhausted claims from his petition. His current predicament is the result of unforeseen changes in
3 the law.

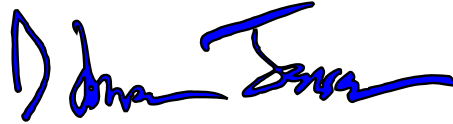
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5 **IV. Conclusion**

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7 Equitable principles weigh in favor of tolling the statute of limitations. Because the court
8 finds equitable tolling warranted, it need not address the parties arguments regarding statutory
9 tolling, or determine whether petitioner's claims relate back to claims in the original petition.
10 Additionally, respondent's request to vacate, nunc pro tunc, the court's 1997 order granting petitioner
11 a stay is denied.

12 Respondent's motion is DENIED.

13 **IT IS SO ORDERED.**

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16 DATED: 1/14/14



D. Lowell Jensen
United States District Judge

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